Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The
Supreme Court of the United States

OCTOBER TERM, 1996

WILLIAM KUCHINSKAS, *et al.*, *Petitioners*,
v.
BROWARD COUNTY, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. If an employer acting pursuant to its written rules and practices: (a) docked pay of its overtime-exempt employees on hundreds of occasions for more than five years, in violation of Department of Labor (DOL) regulations, 29 C.F.R. §541.118(a); and (b) knew that such policies and practices were prohibited; yet (c) waited until *after* it was sued to: (1) change some, but not all, its prohibited policies; and, (2) repay some, but not all, the wages it docked; then, is this employer eligible under the "window of correction", 29 C.F.R. §541.118(a)(6), to escape all liability for overtime wages resulting from those violations?

2. Does 29 C.F.R. §541.5d (the DOL's narrow modification to the salary basis test for partial-day absences in the public sector) allow a public sector employer to treat its over-time exempt employees differently, so it is entitled to authorize "higher-level" exempt employees to take partial-day absences off work without loss of pay and without charging leave, while at the same time denying the same privileges to its other exempt employees, or would §541.5d then be inapplicable and the public sector employer required to comply with the unmodified salary basis test?

3. Is an employer entitled to the 29 U.S.C. §213(a)(1) exemption from the overtime provisions of the FLSA, if it has the burden of proving it meets both of two tests -- the salary basis test and the job duties test -- yet, it never obtains a stipulation on the job duties test, offers no evidence on that test, and after it passes the salary basis test, declines opportunities for a limited trial on the job duties test?

4. Whether a motion for sanctions presenting unrefuted evidence of per se violations of Rule 11 may be denied without comment or explanation.

PARTIES TO THE PROCEEDINGS BELOW

These "job basis" employees of Broward County were Plaintiffs in the District Court and Appellants before the United States Court of Appeals for the Eleventh Circuit:

Cynthia A. Acosta; Marjorie L. Adler; Linwood Alan Bailey; Larry J. Baker; Eva Bell; Thomas Joseph Bowen; Carmen Boye; Phyllis Braswell; Elizabeth Brisset; Diane K. Brown; James H. Brown; Frank Buchert; Warren J. Bullis; Karen S. Byers; Robert Christian; Dave Norman Commons; Steven H. Corwin; Bettie J. Dale; Stephen B. Darmetko; Margaret B. DeCambre; Betty L. Dejean; Victoria Dellaporte; Diane DeLyons; Joseph R. DiLapi; Elleice Dixon; Robert S. Eckers; Fred A. Ellison, III; Allen Ernest; Edward J. Feeney; Joseph E. Finley; Joanne E. Ford; Marilyn Franks; Ruth Franzen; Edna M. Frazier; Grace Gallucci; Caren Glassman; Leonard B. Goldberg; Burton Goldfarb; Joy Davis-Gordon; Raymond M. Gramer; Jane Gritz; Barbara A. Gross; Jerome Gust; Carol B. Harris; Roberta Hartwell; George M. Harvey, Jr.; William Andrew Hill, III; Peter Hofheinz (Fannie Hofheinz as Personal Representative); James Holland; Mary L. Hudson; Kathleen Imhoff; Jodi L. John; Dorothy Jones; Barry C. Junnier; Jonathan S. Kavaliunas; Robert G. Kelsey; Brenda Kintz; John O. Kintz; William Kuchinskas; Raymond T. Kuklinski; Martha J. Laughlin; Joyce Ann Leons; Evan A. Lukic; Charles Malkus; Susan Marchitello; Douglas K. Matthes; Ronald B. Meckler; Joseph Messina; Charmaine M. Michau; Jean M. Mieloch; Ross Moleti; Ellenor R. Neff; David James Nelson; Eugene J. Nicholas; Jeanine Nix; Loraine F. Pasarell; Joyce Rabon; Patricia N. Raglin; Judith Rosbury; Kathleen B. Reese; Locksley M. Rhoden; J. Murray Robertson; Nancy B. Robinson; Ellen Rodriguez; Mary L. Schuster; Janelle K. Scott; Karen Sue Selby; M.K. Shaheed; George William Shelburne; Ernest A. Siegrist; Barbara Rubin; William J. Sorrells; Edward S. Spade; Wolfgang W. Sprenger; James A. Steinmuller; James

C. Stringer; Earl A. Symonette; Richard L. Tash; George A. Teti; Lawrence A. Thomson; Patricia H. Thomson; David Tringo; William P. Valentine; Joan A. Vaughan; Sloane Veshinski; Gail C. Wall; James Earl Washington; Darlene J. Wawrejko; Rebecca R. West; Doris V. Williams; Irving Woodrow Wilson; Kenneth B. Wilson; Kevin Brian Workman; Brian Worthen; Patsy Y. Yeago.

The Defendant and Appellee was Broward County, a political subdivision of the State of Florida.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No.

WILLIAM KUCHINSKAS, *et al.*, Petitioners
v.

BROWARD COUNTY, Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

William Kuchinskas, *et al.*, Plaintiffs in the District Court for the Southern District of Florida, and Appellants in the Eleventh Circuit Court of Appeal, petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *William Kuchinskas, et al. v. Broward County*, 11th Cir. No. 94-4000 (May 17, 1996) (*per curiam*) (unpublished).

OPINIONS BELOW

The May 17, 1996 opinion of the Court of Appeals is unreported and is reproduced in its entirety as Appendix A in a separately bound Appendix to this *certiorari* petition (P.App.). (P.App "A", 1-5).

The Court of Appeals order dated July 24, 1996, denying appellants' petition for rehearing and suggestion for rehearing en banc is unreported and is reproduced as Appendix B. (P.App. "B", 6-7).

The September 7, 1993 opinion of the District Court for the Southern District of Florida with findings of fact and conclusions of law, is reported at 840 F.Supp. 1548 (S.D. Fla. 1993) and reproduced as Appendix C. (P.App. "C", 8-27).

The District Court's final judgment entered September 23, 1993 is unpublished and reproduced as Appendix D. (P.App. "D", 28-29). The District Court's omnibus order dated January 18, 1994 denying Plaintiffs' motion for new trial and to alter or amend judgment is unreported and reproduced as part of Appendix E. (P.App. "E", 33-34).

JURISDICTIONAL STATEMENT

The Court of Appeals' opinion and judgment were entered May 17, 1996. Appellants filed a timely petition for rehearing and suggestion for rehearing en banc which were denied in order dated July 24, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND REGULATIONS

29 U.S.C. § 213(a):

Minimum wage and maximum hour requirements. The provisions of sections 6 (except section 6(d) in the case of paragraph (1) of this subsection) and 7 shall not apply with respect to-

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or * * *

29 C.F.R. § 541.5d:

Special provisions applicable to employees of public agencies.

(a) An employee of a public agency who otherwise meets the requirements of § 541.118 shall not be disqualified

from the exemption under §§541.1, 541.2, or 541.3 on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because-

(1) permission for its use has not been sought or has been sought and denied;

(2) accrued leave has been exhausted; or

(3) the employee chooses to use leave without pay.

* * * *

[Effective Date: September 18, 1992. 57 Fed.Reg. 37,666 (August 19, 1992)]

29 C.F.R. § 541.118:

Salary basis.

(a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which

amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

(1) An employee will not be considered to be "on a salary basis" if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.

(2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

* * *

(4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. The employer may, however, offset any amounts received by an employee as jury or witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

(6) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

29 C.F.R. § 578.3:

Violations for which penalty may be assessed.

* * *

(c) *Willful violations.*

(1) An employer's violation of section 6 or section 7 of the Act shall be deemed to be "willful" for purposes of this section where the employer knew that its conduct was prohibited by the Act or showed reckless disregard for the

requirements of the Act. All of the facts and circumstances surrounding the violation shall be taken into account in determining whether a violation was willful.

(2) For purposes of this section, an employer's conduct shall be deemed knowing, among other situations, if the employer received advice from a responsible official of the Wage and Hour Division to the effect that the conduct in question is not lawful.

(3) For purposes of this section, an employer's conduct shall be deemed to be in reckless disregard of the requirements of the Act, among other situations, if the employer should have inquired further into whether its conduct was in compliance with the Act, and failed to make adequate further inquiry.

STATEMENT OF THE CASE

(i) Introduction-Jurisdiction in District Court

This action for recovery of unpaid overtime wages was brought against Broward County (County), a political subdivision of the State of Florida, pursuant to the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.* (FLSA). Jurisdiction in the District Court for the Southern District of Florida was based upon 28 U.S.C. § 1331. [1]

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[1] The Complaint was originally filed in state court, but was removed to federal court by the County. (P.App. 35, at D.E.

(ii) Relevant Facts

The County denies its "job basis" employees payment for any and all overtime hours they work. P.App. 91.

Yet, pursuant to its written rules, on more than three-hundred (300) separate occasions during a three-year period selected for review, the County docked the pay of its "job basis" employees, including some plaintiffs. P.App. 130-147.

The docking violated Department of Labor (DOL) regulations which prohibit docking pay of overtime-exempt employees who must be paid a predetermined guaranteed amount each paycheck, which is not subject to reduction based upon quality or quantity of work performed. 29 C.F.R. § 541.118 (a).

Job basis employees earning as little as $6.87 an hour were docked pay in increments as small as fifteen minutes and as much as seven hours for a given day. P.App. 135-137. Their pay was docked based upon their hourly rate of pay. P.App. 105. The three-hundred (300) instances of docking that were selected for review, occurred between June 1988 (three years prior to the filing of this lawsuit), to September 1991 (three months after the lawsuit). P.App. 130-147. The docking during this period occurred in 65% of the County's departments.

The County admitted that hundreds of additional instances of actual docking also occurred from April 1986 to June 1988, but it chose to ignore review of that time period since the figures would not have been substantially different. P.App. 99, 102-104.

1, 2, 3).

None of the reported instances of pay-docking occurred because the job basis employee took time off work when his or her leave was exhausted. P.App. 97, 111. Nor did docking occur because of a clerical or computer error. P.App. 106. Nor did it occur because of lack of work.

Rather, according to testimony of County officials, and the written rules themselves, the County's policies required job basis employees be docked pay for tardiness, for inadequate performance, and for discipline. P.App. 85, CSRR 14.224 (tardiness will cause the employee to be "penalized fifteen minutes pay for each fractionalized part of fifteen minutes he/she is late"); 83-86; 95-96, 110, 92.

Pay-docking was authorized and mandated by the County's Civil Service Rules and Regulations (CSRR). P.App. 81-89. The County's pay, leave, and discipline policies set forth in the CSRR are centrally issued, developed, authorized, and revised, only through the County Administrator's office. P.App. 88. Department directors do not have the discretion to ignore the CSRR. P.App. 100.

Prior to September 1991, the leave, tardiness, and discipline policies in the CSRR made no distinction between hourly employees entitled to overtime pay, and those the County designated as "job basis", except to provide that job basis employees were not entitled to overtime wages. P.App. 81, 99-100.

In direct response to this lawsuit, however, the County's outside labor lawyers asked it to conduct an audit to determine if any job basis employees had lost pay as a result of the County's policies, to reimburse those who had been docked, and to change its written policies so the "window of correction" could be used as a defense. P.App. 153-157.

In September 1991, three months after the lawsuit against it was filed, the County revised its CSRR with respect to docking pay of job basis employees for partial day absences. P.App. 87.

The revisions left unchanged, however, disciplinary rules subjecting all employees, including job basis employees, to suspensions without pay for minor infractions such as absenteeism, excessive tardiness, abuse of sick leave, insubordination, and accepting gratuities. P.App. 83-84; 162 ("Directors are also obligated to take effective disciplinary action in cases of performance or attendance abuse"); P.App. 86, CSRR 14.229.g. (taking sick leave under false pretenses "shall be without pay").

In March 1992, job basis employees who had been docked pay between June 1988 and September 1991 were reimbursed with interest for those losses. P.App. 130-147. The County chose not to reimburse job basis employees whose pay had been improperly docked between April 15, 1986 and June 1988.

Moreover, Plaintiff Raglin, a job basis employee who was docked pay after June 1988, was never reimbursed. P.App. 148 A, 148 B (paid for 77 hours one pay period and for 79 hours another pay period, instead of regular 80 hours) compare to P.App. 130-147 listing job basis employees reimbursed).

Also omitted from any consideration for reimbursement were those job basis employees who had received less money when they left their employment with the County. They received less money because the required reductions to their leave banks for partial day absences resulted in less accrued leave hours for which they were entitled to receive payment. P.App. 100-102; 115.

Job basis employees were treated in the same manner as hourly workers in all ways that mattered, except they were not paid for overtime hours they worked. Some were even required to work two hours overtime (without additional pay) to "earn" an hour of leave. P.App. 11, ¶13.

They were required to work a minimum of 37 1/2 hours per week, or make up the deficiency by charging leave in hourly increments (P.App. 96-97; 157-159), or suffer loss of pay in hourly increments. P.App. 120-121. They were required to complete time sheets to prove they either worked the required 37 1/2 hours or made up the difference. They were required to obtain advance approval for any time they wished to take off work. P.App. 118.

On the other hand, "open-range" employees, a sub-group of job basis employees (P.App. 107), were not required to complete time sheets, and could take up to two hours a day off work without charging it to an accrued leave bank (P.App. 157-159). Open-range employees were considered the County's "higher level administrators and professionals" (P.App. 108), and its "key managers and professionals". P.App. 157. Regular job basis employees, however, were not given this discretion.

For example, Mr. Rosenberg, the County's Personnel Director since 1989, understood that as an open-range employee he could take part of a day off work and not charge it to leave (P.App. 116-118: he could choose not to "be in a status where [his] pay is [] subject to docking"). Job basis employees reporting directly to him, however, were not given the same discretion and latitude (testimony of Scott Bugg (P.App. 120-123); James Acton, (P.App. 127-129).

Indeed, Mr. Bugg testified that as a job basis employee himself, he thought it fundamentally unfair that a job basis

employee who worked 12-14 hours on Monday, then arrived at work one hour late on Tuesday, was required to either charge the hour to a leave bank, or work through lunch or stay an extra hour the same day to make up the time, or lose an hour's pay for that week. P.App. 122-123.

Evidence presented at trial proved that at least a year prior to the filing of this lawsuit, responsible officials at the County knew that its policies and practices with respect to job basis employees did not comply with DOL regulations for entitlement to exemption from payment of overtime wages.

For example, Mr. Rosenberg reviewed the CSRR when he became Director in 1989, knew the DOL regulations required overtime-exempt employees be paid on a salary basis, and knew the CSRR did not contain a provision for job basis employees that complied with the salary basis test. P.App. 119.

Furthermore, Mr. Rosenberg and his assistant, Mr. Bugg, knew of and discussed both the 1990 *Abshire* case from the Ninth Circuit and the *Atlanta Firefighters* case from the Eleventh Circuit and what the implications of those holdings were (loss of exemption if employee subjected to docking for tardiness or violating other rules, or for partial day absences). P.App. 98, 112-114, 124-126.

Indeed, Mr. Rosenberg wrote a memo February 4, 1991 in which he stated that if they waited to change their procedures with respect to the County's job basis employees, they would "be unnecessarily increasing our ultimate liability". P.App. 150, 151.

The County's in-house counsel concurred with Rosenberg's assessment in her memo dated March 4, 1991 and offered her assistance in drafting the necessary new procedures. P.App. 152. Yet, no memos were sent, no

rules changed, no audit, no reimbursements, until the June 18, 1991 lawsuit and resulting instructions from outside labor counsel spurred the County to attempt correction in an effort to avoid liability. P.App. 153-156.

Job basis employees who were plaintiffs performed various job duties at the County, but they were not employed in public safety, and were not members of a union or eligible for membership. P.App. 64, 66.

(iii) Procedural History

A Complaint for recovery of unpaid overtime wages was filed on June 18, 1991 by two-named plaintiffs on behalf of themselves and similarly situated "job basis" employees of the County. (P. App. 38). Pursuant to the opt-in provisions of 29 U.S.C. §216(b), 115 present and former job basis employees of the County opted-in to the action by filing notices of consent.

As its eighth affirmative defense, the County alleged plaintiffs were exempt from the mandatory overtime provisions of the FLSA because they were all either executives, administrators, or professionals under 29 U.S.C. § 213(a)(1). (P.App. 44 at ¶ 8; 49 at ¶ 8 (Amended Answer dated February 22, 1993 by order dated March 10, 1993, granting leave to amend P. App. 30, 45).

A two-day bench trial was held May 26 and 27, 1993. Plaintiffs were not permitted an opening statement, but the County was allowed to present one after presentation of plaintiffs' case. (P. App. 94). There were no closing arguments. Each side was asked to prepare a post-trial brief, and plaintiffs were not permitted to respond to the County's.

On September 7, 1993 the district judge issued findings of fact and conclusions of law with respect only to whether the County complied with the salary basis test (P. App. 8) while also acknowledging that an employer has the burden of proving two tests before it is eligible for exemption from the FLSA: both the salary basis test and the job duties test (P. App. 16, ¶4).

It concluded the County had violated and failed the salary basis test on multiple occasions over multiple years by docking the pay of job basis employees, including some plaintiffs, pursuant to written County rules and regulations mandating such docking. (P.App. 11 at ¶10, 23 at ¶23)

The district court also concluded, however, that the County was nevertheless only liable to those employees who had actually been docked pay, and ultimately not liable even to them because the County was eligible for escape from liability through the "window of correction". (P.App. 21, ¶19; 23-26).

The opinion concluded by asking the County to "submit a proposed form of judgment prepared in accordance with these findings and conclusions". (P.App. 26 at ¶32). The proposed "Final Judgment" was submitted to the court on September 16, 1993. Plaintiffs' counsel were served by mail the same day. (P.App. 59-62).

Plaintiffs served their objections to the proposed form of final judgment on September 21st. It was filed September 22nd. (P. App. 63-64; 36 at D.E.189). Objection was raised to the propriety of *final* judgment in the County's favor since it had not yet proved it met the second prong of the two-part test for exemption, namely the job duties test.

Final judgment as originally proposed by the County was entered September 23rd (signed by the judge September 20th) (P.App. 28; 36 at D.E. 188). Plaintiffs' objections

were denied as moot in Order dated September 27th (P.App. 32).

Plaintiffs filed a timely motion for new trial and to alter or amend judgment, again raising the issue that the County was not eligible for final judgment in its favor since it had not proven it met the job duties test. (P.App. 65). The objections, and motion for new trial pointed out that on March 23, 1993, two months prior to trial, plaintiffs had expressly stated they did not concede that their actual job duties comported with regulatory requirements for designation as executives, administrators, or professionals under § 213(a)(1), but that trial on their job duties would be necessary if the County prevailed on the salary basis test. (P.App. 57-58).

The job duties issue was not mentioned in the parties' joint pretrial stipulation dated November 1992. The County also subsequently failed to include the issue in its unilaterally amended and submitted pretrial stipulation, either as an issue remaining to be litigated, or as a stipulated fact. (P. App. 50-56 served February 22, 1993 with Defendant's Motion for Leave to Amend Answer, Affirmative Defenses, and Pretrial Stipulation, P.App. 45); motion granted March 10, 1993 (P.App. 30-31).

The County opposed the motion for new trial, claiming it should not be required to prove it met the job duties test, because that element of its eighth affirmative defense had not been mentioned in the complaint. (P.App. 67). Plaintiffs' motion for new trial was denied without comment on the need for trial on plaintiffs' job duties. (P.App. 33).

Plaintiffs filed a motion for sanctions under Rule 11 and other provisions (P.App. 73). The motion presented unrefuted evidence that lawyers for the County had

knowingly submitted, at trial and in their post-trial briefs, false deposition testimony about their own pre-lawsuit participation in review and correction of the County's policies. What the County knew, when it knew it, and when it first undertook steps to correct its prohibited policies, were relevant and material to issues of inadvertence, good faith, and willfulness, all key issues.

The district court denied the motion for sanctions without comment (P.App. 33).

In opinion dated May 17, 1996, the Eleventh Circuit affirmed the judgment of the district court, (P.App. 1), and on July 24, 1996 denied, without comment, appellants' petition for rehearing and suggestion for rehearing en banc (P.App. 6).

Although plaintiffs appealed the district court's denial of their motion for sanctions without explanation, the issue was neither addressed in the opinion affirming judgment, nor mentioned in the order denying rehearing and rehearing en banc.

REASONS FOR GRANTING THE PETITION

I. CONFLICT EXISTS AMONG THE COURTS OF APPEALS ON THE APPLICATION OF THE FLSA "WINDOW OF CORRECTION", AND APPLICATION OF THE FLSA SALARY BASIS TEST AND ITS DISCIPLINARY DOCKING RULE

With respect to the salary basis portion of the test for exemption, the Eleventh Circuit held it was unnecessary to even determine whether affected employees were ever paid on a salary basis, "because even if the affected employees

were not paid on a 'salary basis,' the County can benefit from the so-called 'window of correction' * * * ", since the reasons for docking were not lack of work, and after it was sued it repaid some docking and changed part of its prohibited policies (P. App. 4). In doing so, the court adhered to its earlier decision in *Lee v. Flightsafety Services, Corp.*, 20 F.3d 428, 433 (11th Cir. 1994) which construed the word "or" in the regulation as strictly disjunctive (since window of correction uses the word "or", either circumstance -- inadvertence, or all reasons (except lack of work) -- qualifies for avoidance of liability after the employer is sued).

The Eleventh Circuit's vision of the "window of correction" effectively allows employers to willfully violate FLSA regulations for any number of years, then if sued, magically and retroactively *create* an exemption from the FLSA that never existed.

Its strict, disjunctive interpretation of the window of correction conflicts with all six circuit courts of appeals to have addressed the issue, and with the DOL's interpretation of its regulation.

Its interpretation of the salary basis test -- requiring employees show proof of actual docking -- conflicts with eight of nine circuit courts of appeals.

A. This Court Has Acknowledged The Conflict Among the Circuits By Granting Employees' Petition For Writ Of *Certiorari* Last Term In *Auer v. Robbins* On The Same Issues

The Court granted employees' petition for a writ of *certiorari* in *Auer v. Robbins*, 65 F.3d 702 (8th Cir. 1995),

cert. granted, 116 S.Ct. 2545 (1996), on the same issues presented here: interpretation of the salary basis test and the window of correction.

Indeed, the facts here are more egregious than those presented in *Auer*, since there is evidence the County willfully violated the FLSA by engaging in hundreds of instances of actual pay-docking of job basis employees, pursuant to written rules, for reasons it knew were prohibited by FLSA regulations.

B. The Eleventh Circuit's Interpretation Of The Window of Correction Conflicts With Six Circuit Courts of Appeals

The Eleventh Circuit interpretation of the window of correction, 29 C.F.R.§ 541.118(a)(6), conflicts with all six circuit courts of appeals [2] to have addressed the issue. Indeed, no other circuit court of appeals has ever permitted an employer to escape liability through the window of correction where the employer engaged in multiple, recurring, docking pursuant to express written policy.

The case most directly on point is *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2nd Cir. 1991), *cert. denied*,

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[2] Its interpretation also conflicts with the DOL's interpretation which is entitled to deference under *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Salary Basis*, Wage & Hour Manual (BNA) 99:5257 (December 24, 1991) where DOL stated impermissible disciplinary docking which occurs "on a regular and recurring basis (e.g., because of an employer's policy)" results in loss of exemption for all employees in class affected by such deductions.

506 U.S. 905 (1992). There, the DOL was the plaintiff. It argued successfully that even though the employer corrected its impermissible docking policy prior to the filing of the lawsuit, and even though only 24 out of 400 affected employees were actually docked (including architects and scientists earning $30,000 to $70,000), the employer could not escape liability through the window of correction because the docking, although for reasons other than lack of work, was not inadvertent.

Specifically, the Eleventh Circuit conflicts with these circuits: **Second:** *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 616-617 (2nd Cir. 1991), *cert. denied*, 506 U.S. 905 (1992) (window "allows employer that makes an impermissible, but inadvertent, deduction * * * to correct the error");

Third: *Balgowan v. New Jersey*, 84 F.3d 656, 663, *vacated and reh'g granted on other grounds*, 3 WH Cas.2d 672 (3rd Cir. 1996) (window "only applies to inadvertent errors * * * [and] [a]ny docking made pursuant to a written policy, * * * , may not be considered 'inadvertent");

Seventh: *Klein v. Rush-Presbyterian*, 990 F.2d 279, 287-288 (7th Cir. 1993)("intentional and impermissible deductions made for reasons other than lack of work do not meet the window's requirements");

Eighth: *Auer v. Robbins*, 65 F.3d 702, 711, n.7 (8th Cir. 1995), *cert. granted*, 116 S.Ct. 2545 (1996) (although agreeing with *Lee*, 20 F.3d 428 (11th Cir. 1994) that window should be read disjunctively, court acknowledged "[t]he 'window of correction' is not available if the employer has a settled policy of making improper deductions") (citing *Malcolm Pirnie*);

Ninth: *Abshire v. County of Kern*, 908 F.2d 483, 489 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991)

("exception is for the employer that makes a one-time improper deduction and then corrects its error");

D.C.: *Kinney v. District of Columbia*, 994 F.2d 6, 11 n.5 (D.C. Cir. 1993) ("regulation * * * merely provides an escape clause for employers who inadvertently make improper deductions").

The Eleventh Circuit held the plain meaning of the word "or" in the regulation, is always disjunctive. P.App. 4. This renders the preceding word "inadvertent" immaterial and useless because it is subsumed by "all reasons" (except lack of work).

Yet, the plain meaning of "or" includes a conjunctive interpretation when that makes more sense and vindicates the purpose of a statute. *See DeSylva v. Ballentine*, 351 U.S. 570, 573 (1956) ("or" often used carelessly for "and"); *U.S. v. Fleet Factors*, 901 F.2d 1550, 1554 n.3 (11th Cir. 1990) (construing "and" as "or" because more faithful to statute); *U.S. v. Moore*, 613 F.2d 1029, 1040 nn. 85, 86 (D.C. Cir. 1979) (collecting cases where "and" substituted for "or"); Black's Law Dictionary 987 (5th ed. 1979) ("or" may be construed to mean "and").

C. The Eleventh Circuit's Interpretation Of The Salary Basis Test Regulation Conflicts With Eight Out Of Nine Circuits

The Eleventh Circuit conflicts with all but one of nine circuit courts of appeals on the issue of whether evidence of actual docking is necessary to prove employees were "subjected" to impermissible docking.

The majority view simply makes more sense. The regulation requires the exempt employee's pay not be "subject to" reduction for variations in quality or quantity

of work performed. 29 C.F.R. § 541.118(a). The plain meaning of the term "subject to" is: "governed or affected by; * * * answerable for". Black's Law Dictionary 1278 (5th ed. 1979).

Since the regulations forbid such a policy with respect to purported executives exempt from overtime, the very existence of such a written policy would serve no legitimate purpose other than to *threaten* "executives" with docking for reasons prohibited by the regulations. Those threatened with docking, have no doubt been *subjected* to docking.

Atlanta Professional Firefighters Union v. City of Atlanta, 920 F.2d 800, 805 (11th Cir. 1991) is perhaps the case most often cited for the proposition that actual, not merely "theoretical", docking is necessary before an employer loses the exemption.

That holding was subsequently clarified in *Avery v. City of Talladega*, 24 F.3d 1337, 1341 (11th Cir. 1994) (evidence of a single instance of docking is at first necessary, but then sufficient, to prove that all similarly situated employees were subjected to docking in violation of the regulations).

The requirement that employees submit evidence of actual docking in order to prove the class was subjected to a prohibited docking policy, is a view endorsed only by the Eighth Circuit.[3] *See Auer v. Robbins*, 65 F.3d 702 (8th

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[3] The Fifth Circuit decision in *York v. City of Wichita Falls*, 944 F.2d 236 (5th Cir. 1991) is sometimes cited as requiring actual deductions. Given the procedural posture in *York*, this overstates its holding. In *York*, the court vacated the lower court grant of summary judgment to the employees

Cir. 1995), *cert. granted*, 116 S.Ct. 2545 (1996) ("two-day pay deduction * * * would [arguably] require him to be treated as a nonsalaried employee"); *McDonnell v. Omaha*, 999 F.2d 293, 296 (8th Cir. 1993), *cert. denied*, 114 S.Ct. 1188 (1994) ("mere possibility of an improper deduction in pay does not defeat an employee's salaried status").

Eight other circuit courts of appeals do not require actual docking where there is an express written policy of docking for prohibited reasons:

Second: *Yourman v. Dinkins*, 84 F.3d 655, 656 (2nd Cir. 1996), *cert. pending*; *Martin v. Malcolm Pirnie*, 949 F.2d 611, 615 (2nd Cir. 1991), *cert. denied*, 506 U.S. 905 (1992);

Third: *Balgowan v. New Jersey*, 84 F.3d 656, 662, *reh'g granted on other grounds*, 3 WH Cas.2d 672 (3rd Cir. 1996);

Fourth: *Shockley v. City of Newport News*, 997 F.2d 18, 24-25 (4th Cir. 1993);

Sixth: *Michigan Ass'n of Government Employees v. Michigan*, 992 F.2d 82, 86 (6th Cir. 1993);

Seventh: *Klein v. Rush-Presbyterian*, 990 F.2d 279, 286 (7th Cir. 1993); *Bankston v. Illinois*, 60 F.3d 1249, 1253 (7th Cir. 1995);

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and remanded. In its view, the determination of salaried status required resolution of a material fact since the employer submitted affidavits and testimony that no policy of docking existed and that no docking had ever occurred. Yet, employees, as the moving party, with all reasonable inferences drawn in favor of the employer, offered no evidence of actual docking to controvert the employer's sworn statements.

Ninth: *Abshire v. County of Kern*, 908 F.2d 483, 487 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991; *Hurley v. Oregon*, 27 F.3d 392, 395 n. 7 (9th Cir. 1994); *McGuire v. City of Portland*, 91 F.3d 1293 1295 (9th Cir. 1996); *Hackett v. Lane County*, 91 F.3d 1289, 1291 (9th Cir. 1996);

Tenth: *Carpenter v. City & County of Denver*, 82 F.3d 353, 359 (10th Cir. 1996), *cert. pending*;

D.C.: *Kinney v. District of Columbia*, 994 F.2d 6, 11 (D.C. Cir. 1993).

D. The Eleventh Circuit Conflicts On Interpretation of DOL Modification Of Salary Basis Test In Public Sector

The Eleventh Circuit also conflicts with the Second, Ninth and the Seventh Circuits with respect to the DOL's narrow modification of the salary basis test for the public sector, 29 C.F.R. § 541.5d.

The Eleventh Circuit held that since the DOL modified the partial day absence portion of the salary basis test after the lawsuit was filed, "the County need not promise to comply with the out-of-date regulation." P.App. 5 n.3.

The other circuits, however, have held § 541.5d does not invalidate the prohibition against disciplinary docking. That provision remains valid even if the partial day absence provision is not. *Yourman v. Dinkins*, 84 F.3d 655, 656 (2nd Cir. 1996), *cert. pending*; *Mueller v. Reich*, 54 F.3d 438, 442 (7th Cir. 1995), *cert. pending*, No. 95-586 (1995); *McGuire v. City of Portland*, 91 F.3d 1293, 1295-1296 (9th Cir. 1996). The County never changed that portion of its CSRR and so never "promised future compliance" as required by the window of correction.

II. THE DECISION BELOW CONTAINS ERRONEOUS INTERPRETATIONS OF IMPORTANT QUESTIONS OF FEDERAL LAW AND CONFLICTS WITH PRECEDENT OF THIS COURT

A. The Decision On The Salary Basis Test And "Window of Correction" Eviscerates The Compensation And Deterrence Objectives Of The FLSA And Renders The Regulation Invalid

The FLSA is a law of general applicability to both the public and private sectors. *New York v. U.S.*, 112 S.Ct. 2408, 2420 (1992). As this Court held in *McKennon v. Nashville Banner Publishing Co.*, 115 S.Ct. 879, 884 (1995), since statutes such as the FLSA implicate both compensation and deterrence objectives which must be vindicated, violations by an employer must *not* be disregarded altogether.

Yet, under a disjunctive interpretation bereft of any requirement that the employer prove the prohibited docking was made inadvertently, no employer would bother to comply, and no employee would dare sue. The employee would always lose even if years of violations were proven. Indeed, employers in both the public and private sectors would have carte blanche to willfully violate the FLSA regulations with impunity because there would be no adverse consequence whatsoever, if eventually sued.

Moreover, the Eleventh Circuit vision of the window of correction would render it invalid because employers

violating the regulations "advertently" would be excused from liability.

In *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989) (ADEA), a DOL-EEOC interpretive regulation was struck down as invalid because it permitted employers to avoid liability based solely upon an objective test, "cost-justification", while ignoring the statute's subjective intent criteria -- whether employer engaged in "subterfuge" or had an "intent to evade" the statute.

Similarly, the window of correction is a DOL interpretive regulation which according to the Eleventh and Eighth Circuits, allows an employer to escape liability based solely upon an objective standard, "reasons other than lack of work", while ignoring the employer's subjective intent.

This conflicts with key provisions of the FLSA. *See* 29 U.S.C. § 259(a) (employer may escape liability only if pleads and proves its acts or omissions were in good faith conformity with written ruling or regulation of the DOL); 29 U.S.C. § 260 (employer may only avoid liability for liquidated damages if it proves it had a good faith reasonable basis for believing its conduct did not violate the FLSA); 29 U.S.C. § 255(a) (limitations period extended to three years for willful violations); also 29 C.F.R. § 578.3 (criteria for penalties for willful violations).

Given this statutory background, the Eleventh Circuit's vision of the window would render it invalid under *Betts*, 492 U.S. 158 (1989); and *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual*, 463 U.S. 29, 43 (1983) (agency rule arbitrary and capricious if "relied on factors which Congress had not intended it to consider, [or] entirely failed to consider an important aspect of the problem").

B. The County Was Not Eligible For Final Judgment In Its Favor Because It Offered No Evidence That It Met The Job Duties Portion Of The Test For Exemption

1. *Binding precedent places the burden of proving eligibility for the exemption squarely on the employer.* Despite the County's complete failure to offer proof or obtain a stipulation on the job duties of each plaintiff, and its failure to avail itself of numerous opportunities at the trial court level to redress its earlier omissions, the Eleventh Circuit concluded the County was entitled to exemption.

Its decision conflicts with binding precedent and reverses the well-established burdens of proof in FLSA actions by effectively requiring employees to challenge an employer's affirmative defense *before* the employer offers any evidence on it. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974) ("application of an exemption under the FLSA is a matter of affirmative defense on which the employer has the burden of proof").

For decades this Court has never wavered from these legal principles regarding the FLSA:

(1) exemptions from its mandatory provisions are to be narrowly construed against employers seeking to assert them, and construed broadly in favor of employees. *Mitchell v. Lubin, McGaughy & Associates*, 358 U.S. 207, 211 (1959); *Moreau v. Klevenhagen*, 113 S.Ct. 1905, 1911 (1993);

(2) employers bear the burden of proving employees fit "plainly and unmistakably within [the exemption's] terms". *Phillips v. Walling*, 324 U.S. 490, 493 (1945) (otherwise it would "abuse the interpretive process and []

frustrate the announced will of the people"); *Idaho Sheet Metal Works v. Wirtz*, 383 U.S. 190, 206, 208-209 (1965) (indefiniteness in record should be held against employer);

(3) employer is not entitled to "benefit" of exemption from overtime payments, unless it has first complied with all conditions. *Moreau v. Klevenhagen*, 113 S.Ct. 1905, 1912 n.16 (1993); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392-393 (1960); *Idaho Sheet Metal Works v. Wirtz*, 383 U.S. 190, 208-209 (1966); *Martin v. Cooper Electric*, 940 F.2d 896, 900 (3rd Cir. 1991), *cert. denied*, 503 U.S. 936 (1992) ("if the record is unclear as to some exemption requirement, the employer will be held not to have satisfied its burden").

Two decisions of this Court are particularly instructive. Judgment for the employer on its entitlement to the §213(a)(2) exemption, was reversed in *Idaho Sheet Metal Works v. Wirtz*, 383 U.S. 190, 208-209 (1966) because the "burden of proof respecting exemptions is upon the company, * * *, and since we uphold the Secretary's test, that burden has not been met." Further, the Court declined to order a remand since the DOL's position on the exemption had been "known from the outset", yet the employer did not establish the facts requisite to an exemption from the FLSA. *Id.* at 206.

Judgment for the employer on the § 213(a) exemption was also reversed in *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960) because the conditions for exemption "are explicit prerequisites to exemption, not merely suggested guidelines for judicial determination of the employer's status." Further, the Court held it was improper for the lower court to assume one of the conditions for exemption was met, when the employer offered no evidence to support the fact. *Id.* at 393.

Similarly, the County offered no evidence to prove it met one of the conditions for exemption from the FLSA (job duties test), despite its admission that by well-established law, it had the burden of doing so -- and both lower courts agreed. P.App. 3, 16, 94.

2. *Employees did not waive proof of employer's compliance with the job duties test.* At trial, the County offered no evidence whatsoever on plaintiffs' job duties. It also never entered a stipulation into the record (there was none), and never stated plaintiffs conceded their job duties met the test for exemption as executives, administrators or professionals. Indeed, prior to trial plaintiffs had, in writing, expressly rejected such a concession. (P. App. 57-58). After trial, the County opposed Plaintiffs' objections asking for trial on the job duties test, and opposed their motion for new trial. These actions should have been fatal to the County's claim to exemption.

Yet, the Eleventh Circuit affirmed the County's entitlement to the exemption, concluding that "prior to trial" Plaintiffs had waived their right to proof on the job duties test because:

(1) they were raising it for the first time on appeal;

(2) they had not objected to the County's lawyer's comment during opening statement at trial that plaintiffs, "who we haven't seen, * * * meet the duties test" (P.App. 3; 95);

(3) they had not objected to an objection that was overruled by the court.[4] (P.App.3, n.2; 109); and

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[4] Counsel for plaintiffs was cross-examining the County's witness and eliciting testimony regarding the ever-increasing

(4) neither the district court nor the County could have "suspected" that the FLSA exemption was being challenged on the basis of the job duties test (P.App. 3-4 n.2).

These were improper grounds for finding waiver by the employees. The Eleventh Circuit plainly erred on these critical issues of law and fact:

(1) The issue of the County's failure to offer proof on the job duties test was presented to the trial court *four* times. (P. App. 63, 65, 69, 71).

Plaintiffs served (September 21st) and filed (September 22nd) objections to the County's proposed form of final judgment[5] *prior to entry* of the final judgment (September

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numbers and percentages of employees designated as job basis for purposes of exempting them from overtime wages. Counsel for the County objected, "Your Honor, we have an objection to the relevance of this line of questioning. The [sic] here is, of course, salary basis, not duties test." (P. App. 108-109). The objection was immediately overruled by the trial judge.

[5] It is quite possible the district court was unsure of the extent of judgment to which the County was entitled. It asked the County to "submit a proposed form of judgment prepared in accordance with these findings and conclusions * * *." The findings and conclusions dealt with only the salary basis test, but acknowledged employers have the burden of proving both the duties test, and the salary basis test. P.App. 16, ¶¶ 4 and 5. See ¶ 4 of Explanatory Note to Form 31 (incorporated into Form 32 by ¶ 3): "Attorneys are not to submit forms of judgment unless directed in *exceptional* cases to do so by the court." (Emphasis added).

23rd) (P. App. 36-37, 63), and filed a timely motion for new trial (P. App. 65).

Notably, a judgment is effective only after it is entered, and a timely motion for new trial suspends its finality. Fed.R.Civ.P. 58; Fed.R.App. 4(a), 4(a)(4). On the other hand, a motion is effective when it is served. *Baker Ind. Inc. v. Howard Electrical & Mechanical, Inc.*, 794 F.2d 965, 966 n.2 (5th Cir.), *cert. denied*, 479 U.S. 931 (1986).

(2) On the second day of trial, after plaintiffs had presented their case, the County's attorney asked to give an opening statement. Plaintiffs' counsel objected since plaintiffs had not been permitted one. (P. App. 93-94).

There was no legal basis for objecting to opposing counsel's isolated, self-serving remark in his opening, "they meet the duties test".[6] Assertions made by attorneys during opening, are not evidence. *Wilson v. Johns-Manville Sales Corp.*, 810 F.2d 1358, 1362 (5th Cir.), *cert. denied*, 484 U.S. 828 (1987); Eleventh Circuit Pattern Jury Instructions (Civil Cases) (West 1990), Basic Instruction 2.1 ("anything the lawyers say is not evidence in the case.").

(3) There was also no legal basis for objecting to defendant's *overruled* relevance objection which made little sense given the testimony being elicited. See n. 4, above.)

(4) The County and the court, were aware the County, as an employer, had the burden under the prevailing law to

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[6] Moreover, it was understood that the County's opening was merely "to outline some areas of [its] testimony" (P.App. 93), to show how defendant's case was "organized" and "to just highlight" (P. App. 94), and that it was limited to what the defendant expected the facts to show (Pet.App. 95).

prove both the job duties test and the salary basis test. The court included that in its own conclusions of law. P. App. 16 at ¶ 4.

Although the Eleventh Circuit supported its decision by pointing to the County attorney's comment during his opening statement and his overruled objection during cross, the County itself never raised or relied on those statements. Rather, the County argued plaintiffs waived the job duties test because their complaint for unpaid overtime wages did not anticipate and rebut that part of the County's exemption defense, thereby making the issue "clearly beyond the pleadings". P.App. 67-68.

The Eleventh Circuit, however, did not cite this as a basis for its decision, and the County was clearly wrong on the law since a complaint need not anticipate and rebut defenses. *Vance v. Terrazas*, 444 U.S. 252, 269 n.11 (1980) (burden of proof not shifted because anticipated defense mentioned in complaint); *Gomez v. Toledo*, 446 U.S. 635, 640-641 (1980) (no obligation to plead around affirmative defense); Wright & Miller, 5 Federal Practice & Procedure § 1276, pp.460-461.

Indeed, a complaint for unpaid overtime wages need only allege, and employees need only prove, that they worked for an employer covered by the FLSA, they worked overtime hours, and were not paid for those overtime hours. *See* Eleventh Circuit Pattern Jury Instructions (Civil Cases) (West 1990), Federal Claims Instruction 9.1 for FLSA actions; *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 394 n.11 (1960).

In sum, the job duties test was clearly raised by the pleadings because it was an integral part of the County's eighth affirmative defense -- a defense upon which it

alone, and at all times, bore the burden of proving by clear and affirmative evidence.

The employees should not have been the party penalized because the County "forgot" to prove or obtain a stipulation on an element essential to its defense. Ironically, this was the same argument urged successfully by Broward County (respondent to the instant petition) to its own advantage in *Pacific Indemnity v. Broward County*, 465 F.2d 99, 103, 104 (5th Cir. 1972). There, the party opposing the County had the burden of proving the County received notice, raised the issue in the pleadings, but later "forgot" and failed to include it in the parties' pretrial stipulation and offered no proof of the issue at trial. The court held the County had *not* waived proof by not reminding its adversary of what the adversary had to prove. It found nothing in the rules to suggest that a party waives or admits an issue on which his opponent has the burden of proof, by failing to include the issue in his pre-trial stipulated list of remaining issues.

C. A Motion For Sanctions With Unrefuted Evidence Of Serious Per Se Violations of Rule 11 Should Not Be Simply Ignored

Because of its importance to the bench and bar, this Court has issued opinions on Rule 11 and its obligations, and at least one Circuit considered the issue of sanctions of such "high importance to both the bench and bar" that it deserved en banc consideration. *Thomas v. Capital Securities Services, Inc.*, 836 F.2d 866, 868 (5th Cir. 1988) (en banc).

Undisputed, irrefutable, evidence was submitted proving the County's lawyers participated in acts of misconduct in

order to fabricate a defense for their client. This included knowing use of false testimony about themselves and their pre-lawsuit participation in review and correction of the County's CSRR; knowing use of false testimony about plaintiffs (alleging they hampered the County's efforts at correction); and refusing to correct misrepresentations they had made to the court. (*See* P.App. 73-80 for details on misrepresentations, and evidence). This was evidence of serious per se violations of Rule 11 and other provisions governing sanctions for attorney and party bad faith misconduct during the course of litigation.

The Court has never condoned lying to a court and has always deemed it a Rule 11 violation. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990) (Rule 11 sanctions mandatory if papers filed with court without factual basis, or in bad faith for an improper purpose); *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 538, 554 (1991) (upholding sanctions for giving unreasonable and false information to court).

Accordingly, both the trial court and the Eleventh Circuit erred by completely ignoring plaintiff's motion and their appeal of the issue since, "A serious Rule 11 motion is not a gnat to be brushed off with the back of the hand" and should receive serious attention and an explanation if it is denied. *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1084 (7th Cir. 1987). *See also Didie v. Howes*, 988 F.2d 1097, 1102 (11th Cir. 1993) (abuse of discretion to deny motion for Rule 11 sanctions without explanation, when movant alleged attorney for opposing party had proffered false facts); *Griffen v. City of Oklahoma City*, 3 F.3d 336, 340 (10th Cir. 1993) (order denying sanctions

reversed and remanded because movant made a colorable motion).

Because plaintiffs presented unrefuted evidence of serious per se violations of Rule 11 and other provisions, some type of sanction was mandatory, even if the type and extent of sanctions were within the court's discretion. At a minimum, the false facts should have been stricken from the County's post-trial briefs and from the court's findings of fact, and the attorneys admonished. Yet there was no consequence forthcoming, and the courts gave no reason for "looking the other way." If allowed to stand, the message will be unmistakable, chilling, and unfortunate for both the bench and the bar: as long as you win, it does not matter if you lied to the court to do it.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this petition for a writ of *certiorari* be granted.

Respectfully submitted,

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